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No. 90-1676

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MARY GADE, Director of the
Illinois Environmental Protection Agency,
Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

This supplemental brief is submitted in response to the Brief for the United States as Amicus Curiae.

ARGUMENT

Respondent National Solid Wastes Management Association ("NSWMA") agrees with two of the Solicitor General's three points. NSWMA agrees that "the court of appeals properly rejected petitioner's argument that Section 18(b) of the OSH Act lacks preemptive force." Brief for the United States as Amicus Curiae at 12. As the Solicitor General observed, "every other court that has addressed" Section 18(b) preemption has rejected this argument. *See ibid.* NSWMA also agrees with the

Solicitor General that the Seventh Circuit's analysis of Section 18(b)'s preemptive effect on "dual-purpose" state safety and health regulations is correct because "it properly focuses on whether the state regulation significantly affects worker safety and health." *Id.* at 17.

Respondent disagrees, however, that this case, particularly in its current procedural posture, is one in which this Court should intervene. The law governing Section 18(b) preemption is evolving steadily at the circuit court level. The cases reveal that the lower courts are still evaluating each other's approaches to preemption of "dual-purpose" state safety and health regulations. Evaluation of the Seventh Circuit's analysis by other courts in new factual contexts would continue that process and might well produce a consensus among the circuits. If no consensus emerges, the additional viewpoints of other courts will at least sharpen the issue for later resolution by this Court. Further, many of the issues presented below were not addressed. Indeed, the Seventh Circuit considered only a single provision of one of the Illinois statutes—the requirement that crane operators working on hazardous waste sites must submit a certified record of 4,000 hours of experience operating equipment used in handling hazardous wastes. *See* Pet. App. 31-33. The court remanded the remaining issues, including Respondent's claims that the Illinois training and testing requirements actually conflict with OSHA's Hazardous Waste Standard and that the Illinois statutes' parochial exemptions for local interests violate the Commerce Clause. At the very least, review should await completion of the record below.

I. Further Consideration of Section 18(b) Preemption by the Lower Courts Is Warranted

The Solicitor General correctly noted that no two courts of appeals have articulated precisely the same test for preemption of "dual-purpose" state safety and health regulations. *See* Brief for the United States as Amicus Curiae at 13. But his brief overstates the significance of that fact. Each of the five cases the Solicitor General discussed involved a different statutory scheme examined in a different factual context. In each case, some aspects of the state law were held to be preempted. Thus, contrary to the implication of the Solicitor General's brief, this is not a situation where the circuits have addressed precisely the same question and reached irreconcilable results. Significantly, each successive court has earnestly consulted the reasoning of its predecessors and attempted to refine an existing test. No court has struck out entirely on its own, but neither have the results congealed into opposing majority and minority views. The application of Section 18(b) preemption to "dual-purpose" state laws is still evolving, and the ongoing dialogue among the lower courts suggests that intervention by this Court would be premature.

The Third Circuit wrote on a clean slate when it stated its "primary purpose" test in the *Hughey* and *Tri-County* cases.[1] But, since then, the other circuits have carefully

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[1]In *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), the court held that Section 18(b) preempts state law "only insofar as [such state law] pertains to protection of employee health and safety . . . ." *Id.* at 593. Applying this test, the court concluded that Section 18(b) expressly preempted a provision of the New Jersey Workers and Community Right to Know Act requiring employers to complete work-place hazard surveys. The court rea-

(continued...)

consulted and refined that analysis. Thus, the Second Circuit expressly considered the reasoning of the Third when, in *Environmental Encapsulating Corp. v. New York City,* 855 F.2d 48 (2d Cir. 1988), it sought to determine which of New York City's "dual-purpose" asbestos abatement regulations are preempted by Section 18(b):

> Other courts have indicated that § 18 preempts any state law which has as its "primary purpose" the promotion of occupational safety and health in an area covered by a federal standard. *See Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 137 (3d Cir. 1987) . . . . We do not disagree with this view.

Id. at 57. In applying that analysis, however, the Second Circuit observed that "'primary' is an ambiguous word, and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.'" *Ibid.* (quoting *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Devel. Comm'n,* 461 U.S. 190, 216 (1983)). Thus, it modified the Third Circuit's test, holding that "in order to avoid preemption the City [of New York] must demonstrate only that for each of [its regulations] there is a legitimate and substantial purpose apart from protecting asbestos workers." *Ibid.*

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[1](...continued)
soned that "the primary purpose of [the provision was] the promotion of occupational health and safety" rather than public health and safety. *Id.* at 595. In *Manufacturers Ass'n of Tri-County v. Knepper,* 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the Third Circuit applied this rule to the Pennsylvania Workers and Community Right-to-Know Act.

Less than two years later, in *Associated Indus. of Massachusetts v. Snow,* 898 F.2d 274 (1st Cir. 1990), the First Circuit similarly consulted prior reasoning when it considered which of Massachusetts' asbestos abatement standards were preempted by Section 18(b). The court not only considered the Third Circuit's "primary purpose" test but also evaluated the Second Circuit's focus on whether the challenged regulation has a "legitimate and substantial purpose apart from" protecting employees. *See id.* at 279. The First Circuit ultimately crafted a test very similar to that of the Second, except that it turns on the *effect* rather than the *purpose* of the state law:

> Rather than attempt to divine the Massachusetts Legislature's intent in enacting its asbestos legislation, we look instead to the *effect* of the regulatory scheme. . . . If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public.

Id. at 279-280 (footnote omitted).

The Seventh Circuit's opinion in this case continued the pattern of careful consideration of other circuits' approaches to Section 18(b) preemption. The court rehearsed the First Circuit's reasoning and then refined the analysis into one more consistent with Section 18(b)'s language:

> As the First Circuit persuasively observed, the Second Circuit—like the Third—relies too heavily on an assessment of the legislature's subjective purpose. . . . At the same time, the likelihood that a particular provision will have a beneficial *effect* upon public health and safety is on no better

> ground than a provision supported by a proper state *purpose*. Section 18 is clear: where OSHA has properly established a standard, a state may not create a standard of its own on the same topic unless the state acts pursuant to a plan approved by the Secretary of Labor.

Pet. App. 31. Like the other circuits, however, the Seventh Circuit seeks to preserve the legitimate exercise of state power. It thus would "extricate from the state law or regulation" *only* "those provisions that relate to worker health and safety in a direct, clear and substantial way." Pet. App. 19.

This pattern of refining prior analyses suggests that subsequent decisions of the lower courts can be expected to consider the Seventh Circuit's reasoning carefully as they address Section 18(b) preemption in a broader range of factual contexts. In fact, the First Circuit recently did exactly that when it weighed whether Section 18(b) preempts state tort law. *See Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) (citing the Seventh Circuit's opinion in this case as well as its own opinion in the *Associated Industries* case for the proposition that Section 18(b) preempts "unapproved assertion[s] of 'jurisdiction under State law over any occupational safety or health issue' as to which a federal 'standard' is already in place"). Such continuing contemplation of Section 18(b) preemption by the lower courts might well produce a consensus rule. If not, the additional experience will at least crystalize the issue. The ongoing dialogue among the courts of appeals demonstrates that this is precisely the kind of case calling for patience, as further evolution at the circuit court level likely will "produce the most desirable result." *See* Stevens, J., *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982).

II. Review Should Await Completion of the Record

Even if this case is an appropriate vehicle for the Court's consideration of Section 18(b) preemption, the lack of a complete record below counsels restraint.

The Seventh Circuit's decision left the majority of the issues in this litigation unresolved. The courts below have not yet addressed Respondent's claims: (1) that the 40-hour training requirements of the Illinois Acts are redundant of OSHA's training requirements and therefore preempted; (2) that Illinois' written-test requirement–like the 4000-hour requirement–unconstitutionally supplements the OSHA standard in the absence of an approved state plan; and (3) that the failure of the Illinois statutes to exempt skilled emergency support personnel and employees whose work experience has provided equivalent training places the Illinois Acts in direct conflict with the Hazardous Waste Standard. The courts below also left unresolved Respondent's Commerce Clause challenge to the statutory exemptions for farming, mining, manufacturing and railroad concerns.

Moreover, currently pending are proposed revisions to OSHA's Hazardous Waste Standard. Those revisions, if adopted, would require states to recognize OSHA accreditation of hazardous waste training programs conducted pursuant to 29 C.F.R. § 1910.120(e). *See* 55 Fed. Reg. 2,776 (1990). Because the Illinois Acts require certification of 40 hours of training in a course approved by the Illinois EPA or the United States EPA, *see* Pet. App. 77, 90, the proposed revisions would create another substantial conflict between the Illinois statutes and OSHA's Hazardous Waste Standard. Neither court below has addressed this conflict.

In sum, even if review of this case would be appropriate, it should await full consideration of Respondent's claims on remand, after the Department of Labor adopts the proposed revisions to the Hazardous Waste Standard and after Illinois promulgates implementing regulations. Completion of the record below would enable the lower courts to address the entire state statutory scheme, including the direct conflicts noted above, under the test articulated by the Seventh Circuit and endorsed by the Department of Labor and the Solicitor General.

CONCLUSION

The petition for a writ of certiorari should be denied.

November 26, 1991

Respectfully submitted,

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